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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 526

EDWIN M. REID, doing business as COLLEGE BOOK EXCHANGE, *Petitioner*

v.

HARPER & BROTHERS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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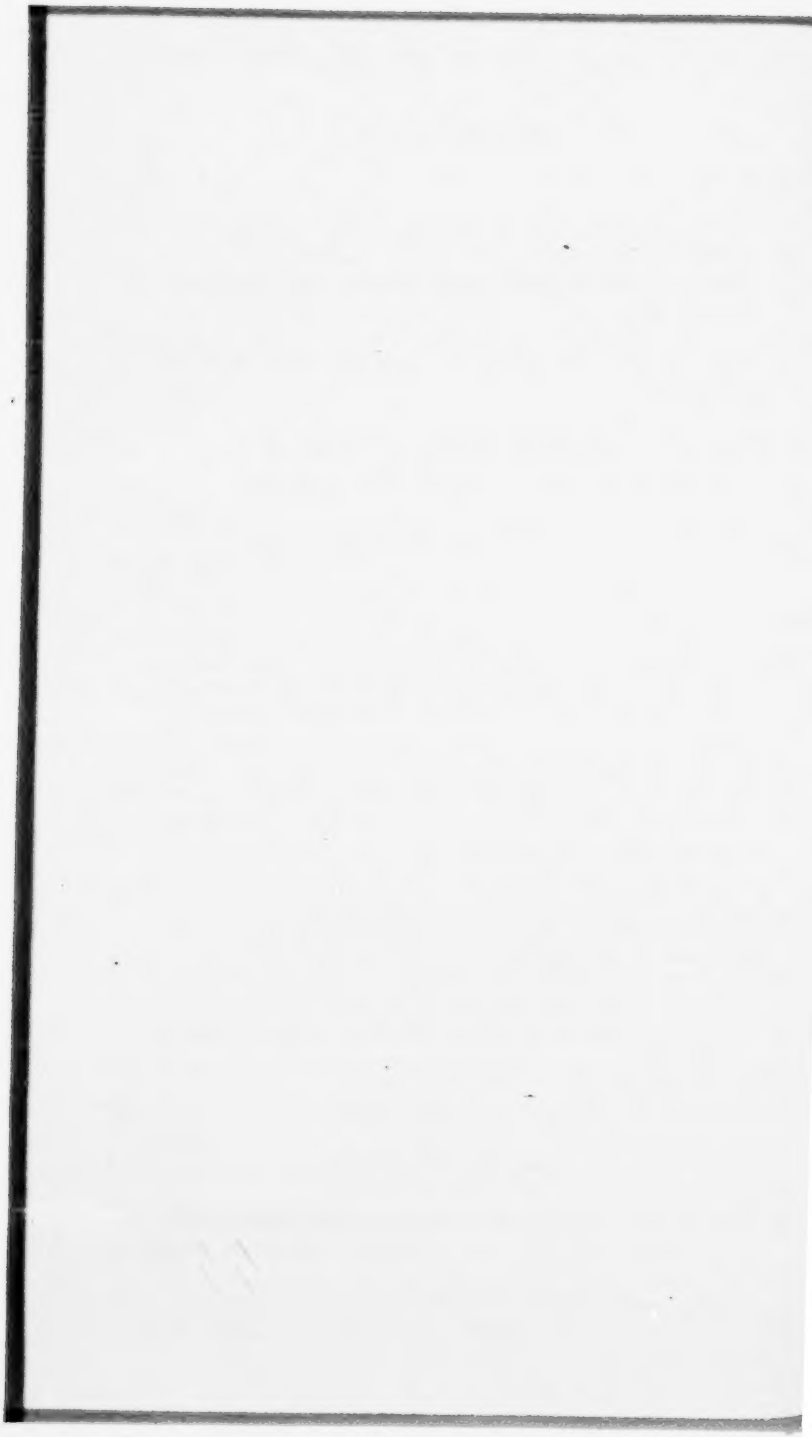

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Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, affirming a jury verdict for respondent in a damage action based on the Robinson-Patman Act.

The writ should issue for two basic reasons. First, the questions presented are of fundamental importance to the construction and administration of the

cost proviso of the Robinson-Patman Act. The Court has recognized the special significance of this feature of the statute (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43-45 (1948)), but has never had occasion to review it. Next, the effectiveness of the basic prohibition against preferential pricing is nullified by the interpretation and application of the cost proviso adopted by both lower courts in this case. As a practical matter their treatment of the statute forecloses private remedies for price discrimination.

OPINION BELOW

The opinion below appears at App. 1a to 6a[1], and is reported at 235 F. 2d 420-423 (2d Cir. 1956). The trial court's instructions to the jury, from which the appeal was taken, appears at PR. 1-44.

JURISDICTION

The judgment of the Court of Appeals, reproduced at App. 7a, was entered July 30, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a)(1). The jurisdiction of the District Court was based upon Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 15.

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[1] The following designations to the record are used herein:

"App."—Opinion and judgment below, comprising pages 1a to 7a of the appendix to this Petition.

"PR."—Printed record below (numbered 1-59, inclusive, followed by 1(a) to 59(a), inclusive).

"Tr."—Transcript of the trial, comprising pages 1 to 1298.

"R."—Other parts of the trial court record, comprising pages 1301-1601.

"PX"—Petitioner's exhibits not printed below.

"RX"—Respondent's exhibits not printed below.

STATUTE INVOLVED

The statute involved is Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(a), and particularly the cost proviso of that provision. So far as pertinent the statute provides that:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are ... sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ."

QUESTIONS PRESENTED

1. Whether the cost proviso of the Robinson-Patman Act permits discriminatory prices to be justified by evidence consisting of unevaluated claims of intangible cost savings, unsupported by any cost data and characterized by the court below itself as "conjectural accounting estimates"?

2. Whether the statute sanctions the justification of discriminatory prices by a cost study which, in the lower court's words, was made in the absence of any "relevant cost records" for the period in question and was based instead on material reflecting composite cost data not even limited to the seller's industry?

3. Whether the statute accords any legal materiality to a cost study which confessedly, and on its face, justifies less than half of the conceded price discrimination?

4. May cost savings computed on a cumulative annual basis be used to defend a pricing system which favors preferred customers against others in identical transactions?

5. Whether the statute authorizes a seller to tailor a cost study by ignoring factors in which there is comparatively greater expense in selling the favored buyers?

6. Whether, contrary to a clearcut declaration of legislative purpose, price discrimination may be cost-justified by distinctively ascribing to the favored customers the benefits of the entire saving resulting from the addition of their orders to the sellers' other business?

7. Whether the buyer's motive in suing is material to a seller's statutory liability for price discrimination?

STATEMENT

(a) The Facts

(1) Petitioner is a Toledo, Ohio book jobber, doing business as College Book Exchange (PR. 48) and respondent, Harper & Brothers, is one of the largest book publishers in the United States (Tr. 9). Peti-

tioner sued for damages on account of respondent's price discrimination, contrary to the Robinson-Patman Act, in charging him more for identical books than it charged his competitors, during the period November 1, 1941 to March 7, 1950 (R. 1301-1308).[2] Petitioner sought an award reflecting the excess prices, approximating $4,100, he paid on actual purchases of respondent's books, plus profits on additional business he was unable to do because of the discrimination, estimated within a range of $38,000 to $49,000 (PR. 32-33).

(2) Respondent's prices, expressed in terms of discounts from its list prices to the public (Tr. 13), were admittedly higher in sales to petitioner than to other jobbers (PR. 6). The discrimination reflected respondent's use of a "confidential" price list, kept secret from its customers, including petitioner (Tr. 12-13, 140-141; PX W-7). This contained three separate discount schedules for orders of similar quantities of books: one for retail booksellers; an intermediate, somewhat more favorable, schedule for certain listed jobbers; and a third, substantially better, schedule, for a few named jobbers, including American News Company and Baker & Taylor of New York City and A. C. McClurg & Co. of Chicago (PX W-7). Petitioner was sold at the schedule for retail booksellers until November 1949, when respondent finally admitted that he was entitled to "Jobber status" and offered him the intermediate schedule (PR. 48).

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[2] Subsequent references to "the period" means November 1, 1941, to March 7, 1950. The length of the period is due to the Acts of Congress tolling the running of time limitations under the antitrust laws from October 10, 1942 to June 30, 1946. Act of Oct. 10, 1942, Ch. 589, 56 Stat. 781, as amended June 30, 1945, Ch. 213, 59 Stat. 306. Respondent's defense of time limitation was overruled by the Court at the outset of the case (Tr. 46-49).

(3) According to its own evidence, respondent's average discounts to petitioner during the period were 39.9 per cent, compared with 44.9 per cent to American News Company, 44.8 per cent to Baker & Taylor and 44.1 per cent to McClurg (Tr. 1087-1089).

(4) Petitioner sold books in every state of the Union (Tr. 121, 432, 436; PR. 50-55) and competed for the patronage of customers who dealt with respondent's preferred jobbers (PR. 50-55, 51(a); Tr. 69-70; 817-818).

(5) On resales to their own customers, the average discounts allowed by petitioner from respondent's list prices, were three per cent less favorable than those granted by American News Company, as follows (Tr. 35-37; PR. 56):

Type of Customer	American News Company	Petitioner
Libraries	34%	31%
Retail Bookstores	37%	34%

That price controlled the jobbers' competitive ability was testified not only by petitioner (Tr. 209-210, 227), but also by the purchasing agent of the Washington, D. C., Public Library (Tr. 102) and by officials of the favored jobbers called as witnesses by respondent (Tr. 821, 868-869, 1065, 1073).

(6) Respondent charged transportation costs to petitioner, but furnished free delivery to customers in New York City (Tr. 1127), the home of American News Company and Baker & Taylor, its largest jobber customers (Tr. 1019, 1046; 1065; PX 10, 10A).[3]

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[3] American News Company also had branch offices in more than thirty leading cities (Tr. 6-7) but received the great bulk of respondent's shipments in New York City. Not more than 20 per

Respondent also allowed more favorable terms of payment to its favored jobbers, secretly allowing them 120 days to pay its invoices, compared with petitioner's 60, and better cash discount conditions (Tr. 606, 979-980, 993-994, 998-999).

(7) Respondent's sole attempted affirmative defense was that its price discrimination against petitioner was justified by cost savings (Tr. 1223-1224; PR. 6, 18, 23). Its sole accounting evidence was a cost study prepared by an accountant named Gayle in 1955, on the eve, and for the purpose, of the trial of this case (Tr. 1083, 1112-1113). It was deliberately "restrict[ed]" to a comparison of *selected* elements of respondent's expenses, called "billing, bookkeeping and shipping costs", in transactions with petitioner and with its three largest favored jobbers, including American News Company (Tr. 1082). This was done on a cumulative annual basis. The method was to divide total annual sales to each of the four customers, as shown by respondent's invoices, into the aggregate annual cost of billing, bookkeeping and shipping the invoiced books (Tr. 1129, 1139-1140).

(8) Taken at its own face value, this study (hereafter the Gayle Study) *fell short by 56 per cent* of justifying the price discrimination which respondent conceded that it practiced against petitioner and in favor of American News. Specifically, $3,211 of price discrimination was admitted on petitioner's actual purchases and only $1,430 was claimed to be justified

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cent of respondent's books, representing new titles, were shipped directly to such branches (Tr. 5, 28-30, 62). Preferential prices were also accorded this customer on separately invoiced "drop" shipments to its branches, no greater in size than those made to petitioner (PR. 23).

by cost savings, leaving an unaccounted for balance of $1,781 (PR. 17-18, 20, 24; App. 2a-3a).

(9) In connection with the cost savings defense, respondent's only other reliance was upon asserted "intangible" savings which it had "not even attempted" to value (PR. 21). According to the trial court, they were said to result from the prompter payment of bills by the favored jobbers, compared with petitioner, and from the avoidance of "overproduction" losses due to the predictability of substantial orders from the favored purchasers (*Ibid*).[4]

(10) Petitioner moved to strike respondent's "evidence as to cost justification on the ground that on its face that evidence does not constitute a cost saving defense within the meaning of the statute", but the motion was denied (Tr. 1224-1224A). The Court also ignored petitioner's requests that the jury be instructed that it must find against respondent on the cost justification issue (R. 1551, 1555; PR. 20).

(11) The Gayle Study was made without reference to any "relevant cost records for the period of 1941 to 1950" (App. 4a; Tr. 1113-1114, 1119-1120). It was based, rather, upon an examination of respondent's 1951 billing, bookkeeping and shipping expenses (Tr. 1091-1092; App. 3a). These expenses were then adjusted back to the period in question by the use of an index of average general clerical salary rates, *not lim-*

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[4] The underlying evidence consisted of an analysis of Reid's account showing that his payments were sometimes late (Tr. 983-989). But the witness in question, respondent's credit manager, admittedly did not know whether there would have been any delinquencies if petitioner had been granted the 120 day terms extended to the favored jobbers (Tr. 999).

Nowhere in the evidence do we find any reference to "overproduction" losses.

ited to the book publishing industry, issued by the Commerce and Industry Association of New York, it being "assumed" that all other costs changed about the same amount (Tr. 1105-1106, 1121-1122). Gayle himself testified: *"A cost study is no good if it does not work on the exact conditions of the industry that it refers to"* (Tr. 1140-1141; emphasis supplied).

(12) The Gayle Study took no account of the fact that respondent charged transportation costs on all deliveries to petitioner, but furnished free delivery to its customers in New York City, including the largest preferred jobbers, American News and Baker & Taylor (Tr. 968-969, 1046, 1127). Nor did the Report consider comparative selling costs (Tr. 1122-1123). There were no such costs in dealing with petitioner according to the testimony of respondent's president that " 'We offered no books to plaintiff; . . .' ", but sold him pursuant to his orders (Tr. 556-557).

(13) As to respondent's lack of any cost records for the period in question, the trial court charged that Gayle's method of adjusting back its subsequent costs was *"a perfectly valid basis for doing it"*, although the jury could accept or reject his "assumptions" or "conclusions" (PR. 19-20; emphasis supplied). He further charged that if the jury accepted Gayle's computations and assumptions, it *"must"* deduct the partial cost differences he showed *"pro tanto"* from the price discrimination against petitioner (PR. 19-20, 24). It was left to the jury to decide whether the averaging of costs on a cumulative annual basis justified respondent's practice of aggregating orders from American News and thereby charging it lower prices on separately invoiced shipments to its branches than it charged petitioner on shipments

of equivalent quantities (PR. 19-20). The Court ignored petitioner's requests for instructions that Gayle took no account of selling and transportation costs and that respondent's discount schedules favored the preferred customers, regardless of the size of their orders compared with petitioner's (R. 1558, 1562). The charge made no comment whatever on these points.

(14) Regarding the purported intangible cost savings, the Court charged (PR. 21):

> *"The defendant has also referred to certain intangible cost savings. They have not attempted to give any value to those costs savings but you can consider them* because to some extent they were costs to the seller, Harper & Brothers, and one thing they say is that the defendant's experience in connection with the collection of the bills of these wholesalers, or with respect to the full jobbers was that they, Harper & Brothers, always got paid promptly, and with respect to Reid they had a lot of trouble.
>
> They also say that due to the fact that over a long period of time they were substantial purchases which were predictable, the very fact of their predictability permitted them to avoid overproduction and thereby avoid losses.
>
> It is very difficult in a trial to attach a dollar value to these intangible elements and the defendant *has not even attempted to do so,* but they have mentioned them and I mention them to you for what they are worth. *You can take them into consideration in addition to the cost savings which have been calculated by Gayle in connection with that report"* (emphasis supplied).

(15) The jury was instructed that before considering any other questions, it should decide whether petitioner was competitively injured by respondent's dis-

crimination (PR. 8-9, 14-15, 16). But in the course of its deliberations it requested that the cost proviso be reread to it (PR. 40-41).

(16) Petitioner was on the stand five days (App. 5a-6a). During a lengthy cross examination an inconsistency was developed between his testimony about the effect of a 1947 fire on his working capital and a letter he had written to his creditors more than six years earlier (Tr. 342, 451, App. 5a-6a). On the sole basis of that letter, the trial court gave the following instructions to the jury, confessedly magnifying the incident beyond the limits deemed proper by respondent's own counsel (PR. 27-28):

> "Now, let me allude for a minute to an important piece of evidence that has been argued about and it is in this case because it affects the credibility of Reid to a very important extent and must be considered by you in connection with the weight that you attach to his testimony *and to the claim which he makes in this case.* And that is the letter in which he talks about the fire. I think it is Defendant's Exhibit P.
>
> "There is no doubt that Reid wrote that letter and Reid does not deny that he said what he said when he said it. It is up to you to decide what that letter means because, *although the attorney for Harper & Brothers was very polite and did not quite say so,* the brutal fact remains that what he is charging Reid with is making a fantastic and baseless claim here in an effort to recover money that he lost as the result of misusing his insurance collection.
>
> Now, you have to decide whether or not Reid lost his insurance money improvidently and then got stimulated by that loss to find a way in which to make up for it by making a baseless claim. You

see, it goes into his basic claim; *it goes into his claim for damages, and it goes into his credibility as a witness,* and you have to give that exhibit very careful consideration.

You have heard Reid's attorney talk about it and, as I recall it, he stated that these price differentials went on before; that this fire did not affect the situation at all; that his business was getting better, and that whatever he said there in that letter did not make any difference.

But that letter is before you, ladies and gentlemen, and you must give it very careful consideration, because if it is susceptible of the interpretation that Reid thought up this Robinson-Patman Act violation case as a means of collecting money from Harper & Brothers which he never believed and does not believe now that he is entitled to, *you can see how it destroys the very basis for his claim and certainly would destroy much of his testimony with respect to his claim for damages"* (emphasis supplied).[5]

(17) Petitioner had accidentally learned of the discrimination against him in 1941, when respondent mistakenly sent him an invoice intended for another jobber and allowing a 5 per cent lower price than petitioner was paying (Tr. 153-157). Subsequently petitioner made frequent oral and written complaints about respondent's discrimination (Tr. 159-168, 969-970). He got no results until November 7, 1949, when respondent wrote petitioner that he was being accorded "Jobber status" in a letter also expressing appreciation of the "nice job" he was doing with its books and of "what it has meant to work out the collection angle

[5] During its deliberations the jury had this instruction reread to it (PR. 41-42).

on your account so smoothly" (PR. 48). Soon after, on March 7, 1950 respondent returned an order from petitioner advising, without explanation, "that we are compelled to discontinue our business relationship" (PR. 57). The complaint in this case was filed May 31, 1950.

(b) The Opinion Below

Characterizing the evidence in question as "conjectural accounting estimates", the Court below nevertheless sustained the charge on intangible costs because the instruction included the remark that they were mentioned "for what they are worth" (App. 3a-4a).

Conceding the absence of "relevant cost records", the opinion sustained the validity of respondent's accounting study on the grounds that it was "the best available procedure" and that "the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data from litigation-inspired accounting methods" (App. 4a).

The charge as to Gayle's averaging of costs on a cumulative annual basis was upheld on the reasoning that to require justification on each transaction "would prove unduly onerous [and] . . . discourage *all* price differentials" and that the Federal Trade Commission had sustained this method "absent a showing that the lack of uniformity in the price spread had any competitive significance" (App. 5a).

The charge that a partial cost justification "must" be accepted *pro tanto* was held immaterial on the ground that the jury "never reached the question of the measure of damages" (App. 5a).

The "motive" charge was upheld as within a trial court's prerogative to comment on evidence and on the theory that the jury had been "properly informed" that petitioner's motive was immaterial to his statutory rights and bore only on his credibility (App. 5a-6a).

REASONS FOR GRANTING THE WRIT

This case raises fundamental questions concerning the application of the cost proviso added to Section 2 of the Clayton Act by the Robinson-Patman Act. The meaning of the proviso has never been reviewed here, despite the Court's recognition of its overriding importance to the intended legislative regulation of price discrimination. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 43-45 (1948). As there emphasized, the proviso's purpose was to overcome the self-defeating weakness of the previous legislation, sanctioning mere quantity differences as a basis for preferential pricing, by requiring the seller to show affirmatively that cost savings support his price differentials. In the words of Congress the proviso requires the seller to prove that the differentials were within "the sphere of actual cost differences" (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 9), "demonstrable as between the particular customers concerned in the discrimination" (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5).

As hereinafter shown, the construction of the proviso adopted below endorses indefensibly loose standards for sustaining a claim of cost savings.[6] Their

[6] This very respondent elected not to defend a Federal Trade Commission complaint against the same price practices challenged here and instead, after the verdict below, entered into a consent order to discontinue them. 3 CCH Tr. Reg. Rep. Par. 25,936 (F.T.C. Docket No. 5898).

practical effect is to invert the prescribed burden of proof by saddling the buyer with the insuperable burden of *disproving* cost justification. Compare *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U.S. 61, 68-70 (1953). The realistic result is to foreclose private remedies for price discrimination. The gravity of this development is emphasized by the conviction of informed lawyers that violations of the antitrust laws are deterred by " 'the threat of treble damage suits, even more than the possibility of Government action' " (Comment, 61 YALE L.J. 1010, 1061 at note 334).

1. The erroneous acceptance of evidence comprised of "conjectural estimates" of "intangible" cost-savings

The trial court advised the jury that it could consider "certain intangible cost savings", although respondent had "not even attempted to give any value to those savings" (PR. 21).

In sustaining this charge the court below adopted the unprecedented view that the Robinson-Patman Act sanctions a cost savings defense based on *"conjectural accounting estimates alone"* (App. 3a; emphasis supplied).

As a matter of law, such evidence is clearly worthless and should not have been submitted to the jury at all, much less brought to its attention.[7] The holding

[7] Actually, read in full context, the trial court's remark that the "intangibles" were submitted for "what they are worth" had no disparaging effect. Immediately afterward, he charged: "You can take them into consideration in addition to the cost savings which have been calculated by Gayle in connection with that report" (PR. 21). And the inference is plain that the jury relied on the "intangibles" in arriving at its verdict. See note 12 *infra.*

below represents the first, and to date the only, repudiation of the need for sound accounting data to prove a cost justification defense. No judicial authority supports it. Neither does the legislative history. Mere "conjectural accounting estimates" do not meet the predetermined Congressional standard that the asserted differences in cost as between customers must be "demonstrable", and "actual" (S. Rep. No. 1502, 74th Cong., 2d Sess., pp. 5-6; H. Rep. No. 2287, 74th Cong., 2d Sess., p. 9). As this Court knows, the Federal Trade Commission has consistently required meticulous cost accounting data as a basis for a cost-savings defense (*Automatic Canteen Company* v. *Federal Trade Commission*, 346 U.S. 61, 68-70 (1953)). The commentators uniformly recognize the indispensability of sound accounting data to establish a cost justification of a price differential. As Cyrus Austin says in his Monograph for the American Law Institute, entitled PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (Rev. ed., Nov. 1953), at pp. 59-60:

> "The establishment of an accurate system of distribution cost accounting based upon current factual and objective cost studies is of prime importance in establishing cost justification based upon differences in selling and delivery costs.
>
> * * *
>
> "Cost analyses based upon unsupported estimates are not acceptable as proof of justification of price differentials".[8]

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[8] See also: Zlinkoff and Barnard, *Basing Points and Quantity Discounts*, 48 COL. L. REV. 953, 1029 (1948); Shniderman, *FTC Orders Under the Robinson-Patman Act: An Argument for Limiting Their Impact on Subsequent Pricing Conduct*, 65 HARV. L. REV. 750, 751 (1952); Bayly, *Four Years Under the Robinson-*

If the contrary view of the court below is correct, then twenty years of experience in construing and applying the statute are wrong.

Acceptance of the lower courts' novel theory would, in effect, invert the statute by saddling the buyer with the impossible burden of *disproving* the existence of any cost justification for a seller's discrimination. Upon a challenge to his prices, the seller need only produce generalized testimony estimating that the differentials were justified by cost savings realized in transactions with favored customers. This could not be rebutted by a buyer. As this Court perceived in the *Automatic Canteen* case, *supra,* 346 U.S. 61, 68-69, 78 (1953), a seller's costs are not even ascertainable from records which a buyer could subpoena and could not be established without the seller's "cooperation". Such "cooperation" is impossible by definition when the buyer is engaged in an adversary proceeding against his seller.

In short, as a practical matter, the holding below curtails the possibility of private enforcement of the Act's proscriptions against price discrimination. Nor can this consequence be minimized on the premise that the Federal Trade Commission may take a different approach. The Commission cannot cover all fronts and its enforcement weapons are not backed by the prophylactic impact of liability in money damages. See Comment, 61 YALE L. J. 1010, 1061 at note 334.

Patman Act, 25 MINN. L. REV. 131, 166-167 (1941); Fuchs, *The Requirement of Exactness in the Justification of Price and Service Differentials Under the Robinson-Patman Act,* 30 TEX. L. REV. 1, 18-19 (1951); Note, 36 COL. L. REV. 1285, 1307 (1936); Note, 50 HARV. L. REV. 106, 111 (1936); Note, 65 HARV. L. REV. 1011 (1952); Comment, 35 ILL. L. REV. 60, 61 (1940).

2. The opinion below erroneously permits discriminatory prices to be cost justified without regard to the seller's cost records or his actual cost savings

The lower court sustained the validity of a cost study admittedly lacking any foundation in the seller's "relevant cost records for the period of 1941 to 1950", and reflecting, instead, overall statistics published by the Commerce and Industry Association of New York. This conclusion was justified on the asserted ground that "the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data delivered from litigation-inspired accounting methods" (App. 4a).

The ruling below is opposed to the statutory concept of individual responsibility; is in square conflict with the expressed legislative intent; and provides an easy shield for the justification of illegal prices.

Not only is the statutory text cast in terms of the prices and costs of the individual seller, but Congress made this plain at the very beginning. It emphasized that the statute concerned "relations between a *given* seller and his several customers" (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 8; emphasis supplied). It warned that cost savings were to be recognized only as "between the particular customers concerned" and only insofar as predicated on *"actual"* cost differences (S. Rep. No. 1502, 74th Cong., 2d Sess., p. 5; emphasis supplied). It said the cost proviso prescribed the following test (*Id.* at 6):

> "It is designed, in short, to leave the test of a permissible differential upon the question: If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much

more per unit would it *actually* cost the seller to do so, his other business remaining the same?" (Emphasis supplied).

There was thus an unequivocal congressional mandate that sellers intending to defend discriminatory prices on cost savings grounds must preserve records disclosing their own cost variances as between their own customers. Otherwise "*actual*" cost differences could not be determined, nor could the specified test be applied.

By permitting recourse to the Commerce and Industry Association figures used in this case, the lower court endorsed a cost justification which did not reflect the seller's "actual" cost differences, but at best showed what they *might* have been. A highly speculative presumption was thereby substituted for the statutory requirement of actual fact. Only by the sheerest coincidence could those composite statistics have reflected respondent's actual experience.

Indeed, the testimony of Gayle himself belies the factual validity of any such basis of cost justification. He admitted that the figures he used were not limited to the publishing industry (Tr. 1121-1122) and further testified: "A cost study is no good if it does not work on the exact conditions of the industry that it refers to" (Tr. 1140-1141).

The mischief of the lower court's ruling far transcends the resulting injustice to this individual petitioner. Once actual individual experience is abandoned as the criterion of cost justification, the seller who discriminates in price is immediately buttressed by the familiar flexibility of statistical analysis. The opinion below thus invites the non-complying seller to dispose of his own records in the comforting realiza-

tion that, if necessary, data supporting his pricing practices can likely be procured from other sources.

Furthermore, contrary to the legislative purpose, the practical result is again to impose upon the victim of discrimination the insuperable burden of disproving the asserted justification. (See p. 17, *supra*). Congress placed the obligation of establishing a cost defense on the seller (*Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44-45 (1948)). It was not the lower court's prerogative to dilute that obligation because of concern for the "dilemma confronting defendants in suits such as these" (App. 4a). As this Court said in a comparable situation, involving a taxpayer's difficulties in meeting a requirement of proof prescribed by the Internal Revenue Code: "The impossibility of proving a material fact upon which the right to relief depends simply leaves the claimant upon whom the burden rests with an unenforceable claim" (*Burnet* v. *Houston*, 283 U.S. 223, 228 (1931)). See also *Boehm* v. *Commissioner of Internal Revenue*, 326 U.S. 287, 295 (1945).[9]

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[9] Neither authority cited below supports the view that a cost justification can be proved by extraneous data when the seller lacks "relevant cost records" (App. 4a). In *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38 (8th Cir. 1951) there was an intensive study of the seller's own cost history over "a test period of more than four years" (191 F. 2d at 51, 59). There was no suggestion in *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351 (1948) that any cost experience other than the seller's was reflected in an "extensive cost study made . . . with considerable care and great practicularity of detail" (*Id.* at 394).

It may be appropriate in a Commission proceeding to consider a seller's current cost data, in testing preexisting price differentials. For the administrative proceeding is in the nature of an equity suit looking to an order governing *future pricing practices*. But such data has no place in a damage suit concerned solely with the past legality of the vendor's discrimination.

3. The rulings below permit a seller to tailor a cost-savings defense by ignoring factors on which higher costs are incurred in transactions with the favored customers

In concluding that respondent's cost study had "a valid basis", neither lower court discussed the issues raised by the exclusion of expense factors on which there were cost savings in the transactions with petitioner. Gayle's testimony showed that his study was deliberately "restrict[ed]" to selected cost elements (Tr. 1082). He admittedly ignored respondent's practice of charging transportation costs to petitioner, while absorbing that expense on deliveries in New York City (Tr. 1127), where its largest jobber, American News Company, had its main office and received the bulk of its books, and its second largest jobber, Baker & Taylor, had its sole location (PX 10 and 10A; Tr. 5, 28-30, 62, 1019, 1046. Nor did the study compare selling costs as between the customers involved (Tr. 1122-1123a), although respondent incurred no such expense in petitioner's case (Tr. 556-557). The legislative history is clear that the cost-savings proviso is particularly concerned with "selling and transportation costs" (S. Rep. 1502, 74th Cong., 2d Sess., p. 5).

By ignoring these self-serving deficiencies in the accounting procedure used here, the lower courts tacitly endorsed the indefensible concept that a vendor may cost-justify his price differentials by a tailored study, reflecting only particular expense items which support the discrimination and disregarding others which do not. The whole truth, not the half-truth, is the contemplated and indispensable standard of cost-justification under the statute. This simple requirement of fair dealing needs declaration now, before other vendors are tempted to follow respondent's example. Certainly private litigants cannot undertake the burden

of proving that other undisclosed variances negate a seller's claimed cost savings.

4. Endorsement of the cumulative costing method authorized below thwarts the Act by insuring an automatic cost defense for the most indefensible form of price discrimination

Respondent's discount schedules were framed on a size-of-order basis. Since he was sold at the retail bookseller schedule, petitioner would have paid higher prices if every one of his orders had coincided precisely in size with those of the favored customers (PX W-7; PR. 48, 22a).

As conceded in the opinion below, respondent nevertheless "calculated comparative costs for plaintiff and defendant's three largest jobbers, by averaging total shipments on a cumulative basis for an entire year" (App. 4a). This process was upheld on the theory that rejection of the "aggregate" method employed might "discourage *all* price differentials, even those actually justified by cost distinctions" (App. 5a).

The vice of the holding below is manifest. Favoritism of preferred customers on equivalent purchases necessarily enables them to get the lion's share of the resale business and thus to buy in larger quantities. Such larger purchases, made possible by the discrimination, can then be used as a basis for cost justifying the preferential pricing. This confronts the victims with a vicious circle from which no escape is possible.[10]

There can be no cost justification for a pricing system which favors some customers against others on

[10] Cumulative costing is permissible, if ever, only where the discounts are based on cumulative annual purchases. Compare the discount schedules in *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37, 41 (1948) and *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F. 2d 919, 921, note 2 (5th Cir. 1951).

identical transactions. The procedure endorsed below completely thwarts the statute by providing an automatic cost defense for the most blatant form of price discrimination.[11]

5. The case raises the important question whether the Act imparts any force to an incomplete cost justification, an issue on which the Circuit Courts have divided and on which this Court's decisions indicate that the wrong result was reached here

Taken at face value, respondent's cost study confessedly justified less than half of the admitted discrimination against petitioner (App. 2a-3a). The trial court denied petitioner's motion to strike it, made on the ground that "on its face that evidence does not constitute a cost savings defense within the meaning of the statute" (Tr. 1224-1224A). The jury was instructed that any partial cost saving "must" be deducted "*pro tanto*" from any award of damages for the discrimination (PR. 20, 24). The court below declined to pass on this charge, stating that the verdict for respondent indicated that the jury never reached the damage issue (App. 5a). It wholly overlooked the fact that, apart from the instruction, the motion to strike put squarely in issue the question whether an

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[11] *Sylvania Electric Products, Inc.*, F.T.C. Docket No. 5728, affords no support for the result below. Both the majority and concurring opinions emphasized that the price differentials there in question had no competitive significance and limited the decision to its peculiar facts. See Commission's slipsheet opinion at 2-3; concurring slipsheet opinion at 3-4. Further, where there is no competitive effect, price discrimination is permissible whether or not it is cost justified. Significantly, the opinion below does not state that respondent's price differences had no competitive effect. The contrary was shown both by the evidence and the course of the jury's deliberations. See par. 4, p. 6, and note 12, p. 24, *infra*.

incomplete cost justification is material evidence. Furthermore the record plainly suggests that the verdict, refusing any damages, was necessarily affected by the charge in question.[12]

In two Circuit Court cases, involving appeals from judgments against the same seller in private price discrimination actions, the question arose whether a certain price differential—a so-called "runway allowance"—had to be cost justified in full. This was held necessary in *American Can Co.* v. *Bruce's Juices, Inc.*, 187 F. 2d 919, 924 (5th Cir. 1951), supplemented 190 F. 2d 73 (5th Cir. 1951), certiorari dismissed, 342 U.S. 875. But the *pro tanto* deduction theory of the trial court here was held proper in *American Can Co.* v. *Russellville Canning Co.*, 191 F. 2d 38, 56 (8th Cir. 1951), where the court expressly recognized that "[o]ur views differ in some respects" from those of the Fifth Circuit Court of Appeals in the *Bruce's Juices* case, *supra* (191 F. 2d at 60).

Furthermore the proposition that a partial cost justification is material evidence opposes two decisions of this Court. In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 44 (1948), this Court declared that the effect of the proviso in Section 2(a) is "to protect competition from *all* price differentials except those based *in full* on cost savings (emphasis

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[12] That the jury reached the cost justification issue is indicated by the interruption of its deliberations to have the cost proviso of the Act reread (PR. 40-41) notwithstanding the instructions to consider first whether petitioner was competitively injured by the admitted discrimination (PR. 9, 14-15, 16). In this setting the conclusion is warranted that the jury sustained the cost savings defense by accepting the partial savings shown in the study and assuming that the unevaluated "intangible" cost items sufficed to make up the difference.

supplied). In *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 757 (1947), this Court held that in damage actions under the Robinson-Patman Act, the purchaser is entitled "to recover three times the *discriminatory difference* without proving more than the illegality of the prices" (emphasis supplied). By the very text of the statute the "discriminatory difference" is necessarily the entire amount of the price differential; for the statute refers to discrimination only in the prohibitory language preceding the cost proviso. See Austin, *op. cit. supra,* page 16, at 37. And the price differential is illegal by definition if it is "in excess of" the cost variance. (H. Rep. 2287, 74th Cong., 2d Sess., p. 10).

The *pro tanto* deduction theory is not only opposed by the controlling precedents and the legislative history, but it substantially weakens the effectiveness of the statute as a preventive force. If partial cost justification is legally cognizable, vendors will inevitably be tempted to favor large buyers with something extra in the secure knowledge that the monetary risks are small. The unjustified part of a discrimination may be altogether sufficient to favor the preferred customer in the competitive struggle for business, but, at the same time, insufficient to warrant the expense of litigation by the prejudiced purchaser.[13] "Private antitrust remedies may thus be simply unavailable to potential plaintiffs whose damages are relatively minor or whose financial standing is weak" (Comment, 61 YALE L. J. 1010, 1057 (1952)).

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[13] In the book jobbing business price differentials of less than 1 per cent suffice to switch business. See *Doubleday & Company, Inc.*, F.T.C. Docket No. 5897, decided 8/31/55, at Slipsheet page 25 (Initial Decision).

6. The rulings below sanction the precise kind of cost-savings claims which Congress took pains to reject

One of the unevaluated so-called "intangible" cost-savings claims, sanctioned below, was that the "predictability" of large purchases by the favored jobbers enabled respondent to avoid "overproduction" losses (PR. 21).

Whether this curious description of the effect of large predictable orders is accepted, or whether it is translated into the more candid proposition that such orders may reduce costs by permitting larger production runs, the legislative history is clear that such savings cannot be invoked to support price discrimination in favor of any particular customers. Congress anticipated and rejected this very tactic when it described the meaning of the cost proviso as follows (S. Rep. No. 1502, 74th Cong., 2d Sess., pp. 5-6):

> "It is designed, among other things, to *preclude* the grant of a discrimination to a particular customer equal to the whole saving in cost *resulting to the seller's entire volume of business as augmented by that customer's patronage;* to preclude also differentials based on allocated or *imputed,* as distinguished from *actual,* differences in cost representing particular facilities or departments which the favored customer may not have immediately utilized, but with which the seller cannot dispense in the general conduct of his business.
>
> " . . . *No particular customer should be permitted distinctively to claim the benefit, nor required distinctively to bear the burden, of the immediate use or nonuse of facilities which the seller must maintain for his business generally*" (emphasis supplied).[14]

[14] To the same effect, see H. Rep. No. 2287, 74th Cong., 2d Sess. p. 10.

The basic purpose of the Robinson-Patman Act is perverted by the contrary construction reflected in the "overproduction" savings theory authorized by the lower court.[15] This affords a prefabricated formula for justifying and perpetuating price discrimination in favor of large historic buyers, the very "evil" the Act was designed to stop. *Federal Trade Commission* v. *Morton Salt Company,* 334 U.S. 37, 43 (1948). For the amount of "overproduction losses" assertedly avoided by a seller due to the historic predictability of past purchases would vary precisely with the size of the customer.

7. The opinion below mistakenly sustains the injection of an immaterial motive factor into a statutory cause of action under the Robinson-Patman Act

In a lengthy instruction, predicated upon an old letter conflicting with a fraction of petitioner's extensive testimony, the trial court told the jury that his motive in suing was material to respondent's liability for price discrimination. The following extracts fairly describe the motive issue, as framed by the trial court's charge, in the face of the conceded discrimination against petitioner (PR. 27-28):

> "Now, you have to decide whether or not Reid lost his insurance money improvidently and . . . to find a way to make up for it . . . thought up this Robinson-Patman Act violation case as a means of collecting money from Harper & Brothers which he never believed and does not now believe that he is entitled to".

[15] The impropriety of this approach is accentuated here by the testimony of respondent's president that it sold direct to the 5000 largest retailers in the country (Tr. 925-6). Like petitioner, all of them were subject to Harper's higher price schedule for retailers.

The instruction emphasized that petitioner's motive bore on the validity of his claim, as distinct from his credibility.[16]

The opinion below sustained this instruction on two grounds: first, that the trial court was privileged to comment on the evidence, citing *Quercia* v. *United States,* 289 U.S. 466, 469-470 (1933); and second, that "the trial judge properly informed the jury that plaintiff's motive for bringing the action had absolutely no bearing on his rights under the Robinson-Patman Act, but was relevant *only* to the extent that it bore on his credibility as a witness" (App. 6a, emphasis supplied).

The injection of a motive criterion into a statutory action for price discrimination, is not sanctioned either by the *Quercia* case or by any other.[17] And the trial court did not inform the jury that petitioner's motive

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[16] The full charge is at pages 11-12 *supra.* It first advised that the letter in question

> "must be considered by you in connection with the weight that you attach to his testimony *and* to the claim which he makes in this case" (PR. 27).

It further said: "You see, it goes *into his basic claim;* it goes into his claim for damages, *and* it goes to his *credibility* as a witness" (*Ibid*).

It concluded: "you can see how it *destroys the very basis for his claim and* certainly would destroy much of his *testimony* with respect to his claim for damages" (PR. 28; emphasis supplied throughout).

[17] Compare, e.g., *Pellegrino* v. *Nesbit,* 203 F. 2d 463, 466 (9th Cir. 1953); *Magida* v. *Continental Can Co.,* 12 F.R.D. 74, 78 (S.D. N.Y. 1951); *United States* v. *Cotton Valley Operators Committee,* 75 F. Supp. 1, 6 (W.D. La. 1948); *Foremost Promotions Inc.* v. *Pabst Brewing Co.,* 15 F.R.D. 128, 130 (N.D. Ill. 1953).

did not bear on statutory rights, but only his credibility.[18]

The generic importance of this feature of the case is that it will gravely impede private enforcement of the antitrust laws. The Court of Appeals' endorsement of the motive aspect of the charge, even as mistakenly construed in its opinion, exposes all potential antitrust plaintiffs to the forbidding prospect of extensive interrogation concerning any of their private financial affairs, on the premise that reverses or lack of resources is relevant to the credibility of their testimony. The burdens of an antitrust plaintiff are heavy enough without this additional liability.

Moreover, the extremity of the charge warrants reaffirmation of Chief Justice Hughes' historic injunction in the *Quercia* case concerning the "inherent limitations" on the court's privilege to comment on the evidence. He there "emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided;' that 'deductions and theories not warranted by the evidence should be studiously avoided.'" (*Quercia* v. *United States*, 289 U.S. 466, 470 (1933). The incompatibility of the charge here with these limitations is manifest from the following concession of the trial

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[18] See note 17 *supra*. Aside from the instant instruction the only other mention of motive was a charge that respondent's "good faith or bad faith" was immaterial (PR. 25).

The fact is, moreover, that petitioner's testimony was not even essential to his claim for the "discriminatory difference" (*Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 757 (1933)). Discrimination was conceded and there was documentary evidence that he competed with respondent's favored customers. See pars. 5, 6, 7 pp. 2, 4, 8 *supra*.

court that he was consciously surpassing the bounds observed by respondent's own counsel in arguing the case to the jury (PR. 27):

> " . . . It is up to you to decide what that letter means because, although the attorney for Harper & Brothers was very polite *and did not quite say so,* the brutal fact remains that what he is charging Reid with is making a fantastic and baseless claim here in an effort to recover money that he lost as the result of misusing his insurance collection" (emphasis supplied).

The destructive effect of this charge on the jury is apparent from the request to have it reread during its deliberations (PR. 41-42).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the decision below should be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 217

October Term, 1955

(Argued January 18, 1956 Decided July 30, 1956)

Docket No. 23849

EDWIN M. REID, doing business as COLLEGE BOOK EXCHANGE, *Plaintiff-Appellant,*

v.

HARPER & BROTHERS, *Defendant-Appellee.*

Before: MEDINA, HINCKS and WATERMAN, *Circuit Judges.*

Plaintiff, Edwin M. Reid, appeals from a judgment of the United States District Court for the Southern District of New York, Palmieri, *J.*, for defendant, Harper & Brothers, entered upon a jury's verdict in plaintiff's treble-damage action brought under § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). Affirmed.

EDGAR HILLS (Campbell & Hills), New York City; Thurman Arnold, Norman Diamond (Arnold, Fortas & Porter), Washington, D. C.; Edward G. Harris (Harris and Sell), Toledo, Ohio, *for plaintiff-appellant.*

ALEXANDER S. ANDREWS, New York City (Horace S. Manges, Jacob F. Raskin, Ira M. Millstein, Weil, Gotshal & Manges, New York City, of counsel), *for defendant-appellee.*

WATERMAN, *Circuit Judge:*

Plaintiff, Edwin M. Reid, doing business as The College Book Exchange, brought this action under § 2a of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat.

1526, 15 U.S.C. § 13(a), alleging that defendant, Harper & Brothers, had violated the Act by charging him higher prices for its books than it charged his competitors, thereby rendering him unable to compete in the sale of Harper's books. Treble damages were sought pursuant to Section 4 of the Act, 15 U.S.C. § 15. He appeals from a judgment against him entered upon a jury verdict for the defendant and from the denial of his motion to set aside the verdict and grant a new trial.

Plaintiff is engaged in the sale of books in Toledo, Ohio. The defendant is a book publisher in New York City. During the ten year period from 1941 to 1950, plaintiff's total purchases from defendant amounted to $46,396.83, or approximately 3½% of his purchases from all publishers. The aggregate difference in prices charged plaintiff, as compared with those paid by plaintiff's alleged competitors, was claimed to be $4,101.57, or an average of $410.00 a year. Plaintiff alleged that he was in competition with eight firms that acted as defendant's wholesalers, distributing books for defendant in various locations throughout the United States. Harper & Brothers conceded that its prices to Reid were higher than to several of its other customers during the period in question. The defendant sought to justify this disparity, however, on the basis of differences in cost between its sales to Reid, and its sales to the other named customers. The relevant section of the Act authorizing such a defense provides "That nothing contained [herein] * * * shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered * * *" 49 Stat. 1526, 15 U.S.C. § 13(a). Harper contended that the total difference between the prices it charged Reid and those that he would have paid if treated like the other purchasers amounted to $3,211.00. It then introduced the testimony and report of an independent accountant in order to justify this differential. The account-

ant had prepared a detailed comparison between "billing, bookkeeping and shipping" costs on transactions with Reid and transactions with three of its largest jobbers. This cost study indicated a saving of $1,430.00 in dealings with the latter. In addition, the defendant testified to further cost savings, attributable to the purchasing patterns of the three jobbers and from the elimination of certain collection expenses incurred in dealing with plaintiff. These items were characterized as "intangible" during the trial. In addition to testimony concerning general production economies, there was evidence that the plaintiff, in contrast to the three jobbers, was on occasion dilatory in paying his bills.

The trial judge properly left to the determination of the jury, as questions of fact, whether plaintiff was in competition with the favored purchasers, whether plaintiff was the victim of discrimination, and whether the effect of such discrimination, if any, was to injure the plaintiff's ability to compete with the other purchasers. Only if the jury be considered to have answered each of these questions in the affirmative, do we reach the questions raised by this appeal which are concerned primarily with the cost justification defense. Plaintiff also claims reversible error because of an alleged prejudicial comment of the trial judge on the evidence.

In connection with the cost justification defense, plaintiff contends that the trial judge improperly charged the jury in three respects, which will be discussed *seriatim*.

First, plaintiff alleges that it was error for the court to permit the jury to consider the "intangible cost savings," claimed by defendant, incident to book production and to the collection of bills. Although price differentials ought to be justified by concrete and specific evidence of cost variances in dealing with different purchasers, and not by conjectural accounting estimates alone, *Automatic Canteen Co.* v. *F. T. C.*, 1953, 346 U. S. 61, 68, it was not error to allow the jury to consider this evidence. The trial court

pointed out the failure of defendant to introduce precise data, and properly discounted the weight of this evidence by adverting to "these intangible elements" as being the proper subjects of consideration only "for what they are worth."

Second, plaintiff also alleges error in that part of the charge concerning the validity of the accounting procedure embodied in defendant's cost study. Since Harper had no relevant cost records for the period of 1941 to 1950, the accountant hired to prepare the study used figures for 1951, adjusted backwards on the basis of general salary rates published by the Commerce and Industry Association of New York. Although such an accounting method obviously lacks the full measure of desired precision, it appears to have been undertaken in good faith and to accord with the minimal requirements of sound accounting principles. Indeed, under the circumstances, it appears to have been the best available procedure. Both the courts and the Federal Trade Commission have recognized the dilemma confronting defendants in suits such as these, and have liberally accepted data derived from litigation-inspired accounting methods. See e.g., *American Can Co.* v. *Russellville Canning Co.*, 8 Cir. 1951, 191 F. 2d 38, 59, and *In re Minneapolis Honeywell Regulator Co.*, 1948, 44 F. T. C. 351, 394. Moreover, the trial court correctly charged the jury that it was "up to you as to whether you wish to accept or reject the assumptions made by Gayle [defendant's accountant] and the conclusions which he drew from them."

A further contention of plaintiff is that the court erred in refusing to charge that defendant's cost study improperly calculated comparative costs for plaintiff and defendant's three largest jobbers, by averaging total shipments on a cumulative basis for an entire year. The complaint is that this approach uses savings realized on large transactions with the favored customers to justify discrimination in their favor on transactions involving smaller

quantities, equivalent to plaintiff's purchases. To require a seller in these circumstances to justify the cost differential in each and every transaction with his buyers, rather than on the aggregate basis of their dealings, would prove unduly onerous. The impact of such requirement might be to discourage *all* price differentials, even those actually justified by cost distinctions. Absent a showing that the lack of uniformity in the price spread had any competitive significance, the FTC has permitted the use of aggregate cost differences to justify price differentials. See, e.g., *In re Sylvania Electric Products, Inc.*, 1954, FTC Docket No. 5728, 3 CCH Trade Reg. Rep. ¶ 25,181. Such a method was permissible in this case. Furthermore, the trial court left the ultimate validity of this computation to the determination of the jury.

Third, plaintiff alleges that the court erred in charging the jury that it could deduct *pro tanto* from the amount of damages, if any, the extent of saving resulting from the transactions with the favored customers. Although one court has approved this partial justification approach, see *American Can Co.* v. *Russellville Canning Co.*, 8 Cir. 1951, 191 F. 2d 38, 56, it is not necessary for us to consider its validity since the jury returned a verdict in favor of defendant and therefore never reached the question of the measure of damages.

With respect to the alleged prejudicial comment, the plaintiff claims that the trial court in his charge to the jury unduly emphasized a letter written by plaintiff to his creditors shortly after a fire had destroyed his office building. The letter indicated that plaintiff was unable to pay his debts at that time because all available cash, including insurance proceeds, was being used to convert the building into an apartment house. The trial judge alluded to this letter in respect to its bearing on the plaintiff's credibility as a witness, since it contradicted his oral testimony. Plaintiff's testimony was an essential ingredient of his case, as evidenced by his appearance on the witness stand

on five successive days, and it was not error for the court to advert to that evidence. Great discretion is accorded federal judges in commenting on portions of the evidence, and even in expressing opinions with regard thereto, provided it is stated that the jury is the exclusive judge of the facts and need not adopt any opinion expressed. *Quercia* v. *United States*, 1933, 289 U. S. 466, 469-470; *Pager* v. *Pennsylvania Rail Co.*, 2 Cir. 1947, 165 F. 2d 56, 58; *Flint* v. *Youngstown Sheet and Tube Co.*, 2 Cir. 1944, 143 F. 2d 923, 925. These precautions were observed by the court. Furthermore, the trial judge properly informed the jury that the plaintiff's motive for bringing the action had absolutely no bearing on his rights under the Robinson-Patman Act, but was relevant only to the extent that it bore on his credibility as a witness.

Since the trial court did not err in its instructions to the jury, but rather left to it the determination of all issues of fact after proper instructions on the law, the judgment below must be affirmed.

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York on the 30th day of July one thousand nine hundred and fifty-six.

Present: HON. HAROLD R. MEDINA, HON. CARROLL C. HINCKS, HON. STERRY R. WATERMAN, *Circuit Judges.*

EDWIN M. REID, d/b/a COLLEGE BOOK EXCHANGE,
Plaintiff-Appellant,

v.

HARPER AND BROTHERS, *Defendant-Appellee.*

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk
By RALPH C. CURCIO
Deputy Clerk

Office - Supreme Court, U.S.
FILED
NOV 26 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1956

No. 526

EDWIN M. REID, doing business as COLLEGE BOOK EXCHANGE,

Petitioner,

v.

HARPER & BROTHERS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1956

No. 526

EDWIN M. REID, doing business as COLLEGE BOOK EXCHANGE,

Petitioner,

v.

HARPER & BROTHERS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

Statement

This is an action for damages for alleged price discrimination under Section 2(a) of the Robinson-Patman Act. The entire price differential amounted to a yearly average of about $321 over a ten-year calendar period.

The case involved a jury trial of virtually three court weeks.

The decision of the Court of Appeals does not conflict with any decision of this Court or of any Court of Appeals. Nor does the case raise any important question of federal law warranting review. It does deal with the factual situation of this particular respondent.

The sole basis for petitioner's application is alleged error in the scholarly charge of Trial Judge Edmund L. Palmieri, which has received the unanimous approval of Judges Medina, Hincks and Waterman in the Court of

Appeals. We submit that a reading of that charge † and of the Court of Appeals opinion approving it will demonstrate the fallacy of petitioner's contention that this case involves an incorrect interpretation and application of the cost proviso contained in the Robinson-Patman Act.

Actually, the jury may have never even reached the portions of the charge relating to the cost justification defense about which petitioner complains. It should be borne in mind that, as stated by the Court of Appeals, the Trial Judge had properly left to the jury the questions of (1) whether petitioner had been in competition with the allegedly favored customers, (2) whether petitioner had been the victim of discrimination, and (3) whether there had been any injury to competition by reason of the price discrimination complained of. In this connection the Court of Appeals aptly stated:

> *"Only if the jury be considered to have answered each of these questions in the affirmative, do we reach the questions raised by this appeal which are concerned primarily with the cost justification defense."* (Italics added) (Appendix to Petition, 3a)

Facts

Petitioner, in Toledo, Ohio, is engaged in the sale of books. Respondent is a book publisher in New York City. It was claimed that during the period November 1, 1941, through March 7, 1950, respondent sold its books to petitioner at higher prices than to petitioner's alleged competitors.

During the *entire period* covered by the complaint (spread over ten calendar years), petitioner's total purchases from respondent amounted to $46,396.83 (Pl.'s Ex. R-10, R. 62, Pet. App. C. A. 58 *), and, although claiming

† Pet. App. C. A. 1-45.

* In this brief these designations are used: R.—Trial transcript; Pet. App. C. A.—Petitioner's printed Appendix in Court of Appeals; Res. App. C. A.—Respondent's printed Appendix in Court of Appeals.

to be a wholesaler, he generally carried in stock only about 140 volumes of respondent's books.* The aggregate difference in prices charged petitioner as compared with prices charged petitioner's alleged competitors was claimed by petitioner to amount to an average of $410 per calendar year, or a total of $4,101.57. (Pl.'s Ex. M-2, R. 518, not printed.)

Respondent's proof established that actually the total difference between the prices it charged petitioner and those that he would have paid if treated like petitioner's alleged competitors amounted to $3,211, or an average of $321 per year. (Def.'s Ex. OO, R. 1083; Res. App. C. A., 4a.)

Petitioner's claim of alleged discrimination was based upon his testimony that he was in competition with eight firms (primarily American News Company, Baker & Taylor Co. and A. C. McClurg & Co.). The eight firms were respondent's eight wholesalers, distributing books for respondent in various locations throughout the United States, who were sold books on the basis of respondent's schedule of wholesale prices (R. 920-956).

Respondent introduced testimony showing that petitioner had not engaged in wholesaling activities such as respondent's wholesalers, and that petitioner was not in competition with such wholesalers. (Def.'s Ex. A, R. 154, Res. App. C. A. 29a; Pl.'s Ex. R-19, R. 119, Pet. App. C. A. 57; R. 217, 1057-1058, 1071.)

Despite the foregoing, the petition refers to petitioner as a "jobber" who "competed * * * with respondent's preferred jobbers". The petition states, further, that respondent "conceded" that it had practiced price discrimination against petitioner, and seeks to convey the impression that respondent's sole basis for contesting petitioner's claim was that such discrimination was justified by cost savings.

---

* Respondent published between 250 and 300 new titles per year (R. 921), and had 2,500 to 3,000 active titles (R. 922).

Petitioner ignores the fact, as stated by the Court of Appeals, that:

> "The trial judge properly left to the determination of the jury, as questions of fact, whether plaintiff was in competition with the favored purchasers, whether plaintiff was the victim of discrimination, and whether the effect of such discrimination, if any, was to injure the plaintiff's ability to compete with the other purchasers." (Appendix to Petition, 3a)

The cost justification defense was presented primarily in the form of a cost study prepared by William T. Gayle, C. P. A., member of the accounting firm of J. K. Lasser & Co., which firm for many years had been the accountants for respondent and other book publishers.

Mr. Gayle computed the savings to respondent in billing, bookkeeping, and shipping expenses in dealing with its wholesale customers as compared with the same expenses in dealing with petitioner. He found such difference to be $1,430 for the period here involved, thus reducing the aggregate price differential between petitioner and respondent's wholesalers from $3,211 to approximately $1,781, or an average of $178 per year.

With respect to this residual average of $178 per year, respondent introduced additional testimony showing that there were further cost savings attributable to (1) the purchasing pattern of respondent's major wholesalers as compared to that of petitioner, and (2) the elimination of collection expenses incurred in dealing with petitioner. These additional cost savings were referred to by the Trial Judge as "intangible cost savings" to be considered by the jury "for what they are worth". (R. 1257.)

The trial consumed fourteen actual trial days. The testimony consists of over 1,200 pages, and hundreds of pages of exhibits were introduced in evidence.

Petitioner and respondent both submitted to the Trial Judge proposed instructions to the jury. Petitioner submitted 107 proposed instructions, respondent 31. (R. 1539-1598.) The Trial Judge spent an entire day in conference

with counsel for both parties, considering the requested charges. The Judge's charge covers 56 pages (R. 1225A-1281), and took one and one-half hours to deliver.

The Trial Judge charged the jury to return a general verdict (R. 1280) and the jury returned such a verdict in favor of respondent. Petitioner made no request for a special verdict in the form of special written findings on each issue of fact (F. R. C. P. 49(a)), to wit, whether petitioner was in competition with respondent's allegedly favored customers, whether he was the victim of discrimination, and whether the effect of any such discrimination was to injure petitioner's ability to compete with the other customers; nor did petitioner request that the general verdict be accompanied by answers to interrogatories upon these issues of fact. (F. R. C. P. 49(b).)

Actually petitioner, under the guise of alleged questions of law of claimed fundamental importance, seeks by this petition, as he sought by his appeal to the Court of Appeals, to lift the "mantle of impenetrable darkness" cast by a general verdict. This he may not do. *Foster* v. *Moore-McCormack Lines* (2nd Cir., 1942), 131 F. 2d 907, cert. den. 318 U. S. 762.

Questions Presented

Petitioner does not contend that this case presents a conflict between decisions of Courts of Appeal, nor that there has been a decision below which conflicts with a decision of this Court, nor that the decision below so far departs from the accepted course of judicial proceedings as to call for this Court's supervision. (Supreme Court of the United States, Revised Rules, Rule 19.) Petitioner contends, rather, after a lengthy trial by the jury method he selected, that the decision below involves "fundamental" questions concerning the cost proviso of the Robinson-Patman Act. (Petition, 14-15.)

It should first be noted that each of petitioner's "questions presented" was briefed at length and argued to the

Court of Appeals. That Court concluded, after passing upon each of said questions:

> "Since the trial court did not err in its instructions to the jury, but rather left to it the determination of all issues of fact after proper instructions on the law, the judgment below must be affirmed." (Appendix to Petition, 6a)

We submit that the review here attempted is not in the interest of the law, but is solely in the interest of petitioner, who seeks simply another appellate review and a reconsideration of all the facts, *de novo,* involved in a complicated and lengthy jury trial. (Chief Justice Hughes, Address to American Law Institute, May 10, 1934, XI Proceedings of American Law Institute 313 (1934).

Moreover, we submit that this case, perforce, can involve " * * * no more than its particular facts." *Wilkerson* v. *McCarthy* (1949), 336 U. S. 53, 67.

Accordingly, we submit, certiorari should be denied.

(a) This petition essentially seeks a reconsideration, *de novo,* of the facts.

Of petitioner's seven enumerated "questions presented" six deal with alleged "fundamental" legal questions raised by the cost defense submitted by the Trial Judge to the jury for its appraisal. The seventh deals with alleged error by reason of the Judge's comment to the jury with respect to an exhibit in evidence, but the comment is so well supported by authority as to make specious petitioner's claim that it involves a fundamental question of law.

In a search to find "an important question of federal law" in the presentation of the cost study to the jury, petitioner would have this Court postulate an inflexible formula applicable to cost justification defenses for all time and all industries, and this, as a matter of law.

Respondent submits that the propriety of a cost study used in support of a cost justification defense depends upon the particular facts and circumstances of the business of which the study is made. The reasonableness and pro-

priety of each study and of each defense can be bound by no rigid rules, because of the infinity of situations comprised in a complex economy. Rather, the reasonableness and propriety of each study and of each defense are questions of fact in each case.

The views here expressed are buttressed by the report of The Advisory Committee on Cost Justification under the Robinson-Patman Act formed by the Federal Trade Commission to investigate the feasibility of developing standards of proof and procedures for use in cost justification studies. In March, 1956, this Committee reported with the following recommendation:

> "The infinite variations of internal organization, methods of doing business, availability of accounting and statistical data, and other important factors, preclude the possibility of developing uniform methods and procedures of cost accounting for Robinson-Patman Act purposes. It must be assumed that cost justification studies will be entrusted to persons who have intelligence, experience, and imagination to adopt sound accounting principles as found in standard works on the subject and in the practices of business enterprises to the requirements of a particular problem.
>
> The Committee believes that any attempt to lay down detailed procedures for all business enterprises or otherwise to straitjacket cost justification would be self-defeating. For this reason it is the earnest hope of the Committee that the Federal Trade Commission, while approving or disapproving particular approaches in individual instances, will refrain as far as possible from adopting specific rules of accounting analyses exclusive of others, and that it will encourage the application of ingenuity and imagination in this complex area.
>
> • • •
>
> What is quite natural and feasible for one company may be entirely impracticable for another because of differences in internal organization, degree of integration, variety of products, complexity of trade channels, methods of sale and delivery,

> range of size and functional status of customers, competitive practices, and many other features of business operation." "Cost Justification Report"—A Report to the Federal Trade Commission By The Advisory Committee on Cost Justification Under the Robinson-Patman Act (March 23, 1956), 13-14.

Thus it may be seen that the Federal Trade Commission's own experts have recommended to it that no specific ritual be created and that each cost justification study be weighed in its own factual context.

This is precisely what the Trial Judge directed the jury to do. (In this case the jury stood in the place of the Federal Trade Commission as the trier of the facts.) For, when commenting on the detailed analysis contained in the expert testimony adduced by respondent in support of its cost justification defense, the Trial Judge told the jury:

> "However, it is entirely up to you as to whether you wish to accept or reject the assumptions made by Gayle and the conclusions which he drew from them." (R. 1255)

He further warned the jury, almost immediately thereafter, that to accept Mr. Gayle's testimony it would have to find that Mr. Gayle's "computations were accurate and in accordance with sound accounting principles, and * * * that his assumptions are justified by the facts". (R. 1255.)

Moreover, when the Trial Judge charged concerning additional savings in cost, which he characterized as "intangible" savings, he expressly told the jury that it could consider only cost savings " * * * which are actually realized by the seller * * * " (R. 1254), and that these intangible savings should be considered by the jury only " * * * for what they are worth * * *." (R. 1257.)

When thus analyzed, the petition does not raise "fundamental" issues of law. Rather, it is an attempt to have this Court guess that the jury went as far as to consider the cost justification defense (the jury may have decided against petitioner on numerous other factual issues such as lack of competition, injury, etc.)—and then to have

this Court hold that *on the facts of this case* the jury was not warranted in upholding the cost defense. Essentially, this is an attempt to obtain reconsideration, *de novo,* of the facts of this case. Such an attempt should not be countenanced.

(b) This case can have no wider applicability than its own particular facts.

As noted above, each cost justification study is *sui generis* (Cost Justification Report, *supra,* p. 14), prepared in the light of the particular facts of the industry or business studied. Any decision, therefore, which might be rendered concerning the instant cost justification defense, based upon the instant record, perforce, could not have any wider applicability than the instant case. What may be argued as inappropriate in the instant case may very well turn out to be "fundamental" to a cost study in the next. This is inherent in cost accounting and the myriad complexities of American business enterprise. Thus each of petitioner's questions would be more correctly stated if modified by the phrase "In this case".

This Court has held that writs of certiorari must be restricted to those cases which present " * * * a problem beyond the academic or the episodic". *Rice* v. *Sioux City Cemetery* (1955), 349 U. S. 70, 74. Accord *Wilkerson* v. *McCarthy* (1949), 336 U. S. 53, 67. The very fact that this cost study must be considered only within the confines of this record and as it pertains to this respondent, makes the case less than "episodic".

Although we shall demonstrate that in any event petitioner's contentions are without merit, we submit that the questions presented herein are solely an attempt to obtain a review of the sufficiency of facts properly submitted to the jury; that the questions are limited to the particular facts of this case; and that, therefore, this case is not an appropriate one for the granting of a writ of certiorari.

ARGUMENT

1. The Trial Judge correctly charged that the jury could consider intangible cost savings "for what they are worth". (Answering Petition, Points 1 and 6.)

The Gayle cost study covered three items of respondent's overall expense, to wit, billing, bookkeeping, and shipping. There remained a total differential of $1,781 for the entire period, which was not accounted for by these items. With respect to this $1,781, however, there is ample proof in the record that there were additional cost savings to respondent, which the jury could justifiably have found accounted for this small differential of about $178 yearly over the ten-year calendar period. These additional cost savings were attributable to the purchasing patterns of respondent's wholesaler customers; and to the expenses incurred by respondent in collecting unpaid bills from petitioner as compared with the prompt credit experience with these wholesalers (R. 938, 849, 1022-1033, 1047, 860, 850, 787, 1032, 1048-1049, 849, 956, 976-1014; Def.'s Ex. OO, 3, 11, 13, 14, 15; R. 1083, Res. App. C. A. 4a).

It was these items to which the Trial Judge referred as "intangible" cost savings, and which he permitted the jury to consider "for what they are worth".

In this connection we note that, contrary to petitioner's mischaracterization, neither the Trial Judge nor the Court of Appeals termed these elements as "conjectural accounting estimates". That expression was used by the Court of Appeals only in discussing the case of *Automatic Canteen Co.* v. *Federal Trade Commission* (1953), 346 U. S. 61.

Legislative History.

That the foregoing elements of cost savings may properly be considered by the jury is established by ample authority, commencing with legislative history. Congressman Utterback stated, in explaining the Robinson-Patman bill, that if predictability and large order placement result in savings to a manufacturer, they may be taken into con-

sideration as cost savings under the bill's cost proviso. Thus Congressman Utterback stated:

> "* * * Or where one customer, devoid of storage facilities, requires spot deliveries during the rush of the season, for which the manufacturer must produce in advance and store himself in order to make the fullest utilization of his plant capacity; while another customer orders for delivery in off seasons, handling the storage himself and saving the manufacturer that cost, such a saving may be expressed in a price differential.
>
> "Or where one customer orders from hand to mouth during the rush of the season, compelling the employment of more expensive overtime labor in order to fill his orders, while another orders far in advance, permitting the manufacturer to use cheaper off-season labor, with the elimination of overtime, or perhaps to buy his raw materials at cheaper off-season prices, such savings as between the two customers may likewise be expressed in price differentials. * * * These examples are illustrative of the way in which the bill permits the translation of differences in cost into price differentials as between the customers concerned, *no matter where those differences arise.*" 80 Cong. Rec., June 15, 1936, p. 9417. (Italics added.)
>
> * * *
>
> "It [i.e., the cost proviso] leaves open *as a question of fact in each case* whether the differences in cost urged in justification of a price differential— whether of operating or of overhead costs—is of one kind or the other.
>
> * * *
>
> "Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail order house, department store, or by the cooperative groupings of producers, wholesalers, retailers, or distributors—and whether those economies are from *more orderly processes of manufacture,* or from the elimination of unnecessary salesmen, unnecessary travelling expense, unnecessary warehousing, unnecessary truck or other forms of delivery, or other such causes—none of them are

> in the remotest degree disturbed by this bill." (Majority Report of Committee on the Judiciary, H. R. 8442, Report No. 2287, 74th Cong. 2nd Sess., pp. 10, 17 (1936). (Italics added.)

Moreover, the Cost Justification Report (*supra,* p. 12) specifically directs that these items of cost be considered:

> "Customer groupings may properly be based not only on quantities sold but also according to the way customers place their orders; whether for immediate delivery or later shipment on a fixed schedule; in large or small orders; placed directly at the factory or through a sales branch; for on-peak or off-peak manufacture, etc. These trade factors may all be reflected in cost and as criteria for customer classification."

The legislative history and authorities, then, are clearly demonstrative of Congress' intent: (a) To allow, as part of the cost defense, differences "* * * no matter where those differences arise", and (b) that the question of cost savings is one "of fact in each case."

The Judge's Charge.

The Judge's charge on these elements (R. 1257-1258) merely called to the jury's attention (1) that there was evidence that respondent's wholesalers over a long period of time made "substantial purchases which were predictable", and which avoided overproduction and losses and (2) that there was evidence showing that with respect to collecting bills it was more costly to collect from petitioner than from respondent's wholesalers. The Judge told the jury that respondent did not attempt to place a dollar value on these elements and that, accordingly, the jury could consider them "for what they are worth." (R. 1257.)

The correctness of the Trial Judge's charge, above, is manifest, particularly when it is read in conjunction with other portions of the charge relating to cost savings. Thus the Trial Judge charged:

> "This means that the only kind of cost savings allowed as a defense under the Act are those which are *actually realized* by the seller from the way in which he delivers the goods or the quantity in which he delivers them." (R. 1254.) (Italics added.)

Answering Petition Point 6.

Respondent never contended, as is argued by petitioner, that respondent's wholesalers' pattern of purchases resulted in lower unit costs or that such lower unit costs were reflected in the cost savings. Petitioner can point to no part of the record where such a statement was made, nor does the Trial Judge's charge so state. What respondent's evidence did show was that predictability and regularity of large purchases resulted in *orderly processes of business* which resulted in savings. And this is solely what the Judge referred to in his charge.

That there is a distinction between *orderly processes* savings and *lower unit cost* savings is demonstrated by Congressman Utterback himself, who approved the *orderly processes savings* (80 Cong. Rec., supra), while on the same page of the Congressional Record he disapproved the *lower unit cost* savings.

Answering Petition Point 1.

In petitioner's Point 1 it is his claim that the Court must narrowly construe the cost defense proviso in the Robinson-Patman Act as permitting only "meticulous cost accounting data." Petitioner argues that because respondent did not place a precise dollar value on these factors of cost saving, it was error for the Trial Judge to let the jury consider them "* * * for what they are worth * * *". Apparently petitioner would have the courts and the Federal Trade Commission tied to an antediluvian concept of cost defense which rejects all elements not proven to the closest mill.

Petitioner's contention in this respect is baseless. The Federal Trade Commission itself has expressly held:

> "Cost studies of the sort present in this matter ordinarily do not afford precise accuracy but must

> necessarily embrace a number of conjectural factors and allocations. * * * Where they are made in good faith and in accordance with sound accounting principles, they should be given a very great weight * * *. Respondent's burden under the act is very great and it should have a liberal measure of consideration when it becomes apparent it has made sincere and extensive efforts to discharge that burden." *In the Matter of Minneapolis Honeywell Regulator Co.* (1948), F. T. C. Docket #4920, 44 F. T. C. 351, 394. See also: *In the Matter of Sylvania Electric Products, Inc.* (1954) F. T. C. Docket #5728, 3 C. C. H. Trade Reg. Rep., Pars. 25,181 and 25,197 (differentials in price are permitted where "reasonably attributable" to cost savings).

Thus it is clear that in each case the determination to be made is whether the difference in price is "reasonably attributable" to the savings in cost.*

In proceedings before the Federal Trade Commission it is the Commission's function to determine whether the difference in price is "reasonably attributable" to the savings referred to. In a treble damage suit tried before a jury, however, it is the jury's function to make this determination. Since the jury was the trier of the facts it had every right to consider these elements "for what they are worth". This is precisely what the Trial Judge charged and what the Court of Appeals held appropriate.

2. The Trial Judge correctly charged the jury with respect to the method used in preparing respondent's cost study—Exhibit 00. (Answering Petition, Points 2 and 3.)

The Gayle Cost Study and How It Was Prepared.

Before Mr. Gayle took the stand, Mr. Madewell, respondent's Traffic Manager, testified that since 1921 he had been

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* In *American Can Co.* v. *Russelville Canning Co.* (8th Cir., 1951), 191 F. 2d 38, 59, 60, the Court of Appeals reversed a District Court decision which applied "too rigid a standard" in determining the sufficiency of an attempted justification.

in charge of billing, shipping, warehousing, correspondence, and complaints, as well as practically everything pertaining to an order, and that as a result of this experience he had "become familiar with the pattern of purchases as represented in particular by the three companies: American News, Baker & Taylor, and McClurg". (R. 1076.)

Based on his experience and his examination of the 1950 invoices of McClurg, Baker & Taylor, and American News, Mr. Madewell testified that the pattern of purchases with respect to number of orders and quantities of titles purchased as shown by the 1950 invoices was approximately the same as the pattern of purchases for those companies during the period covered by the complaint. (R. 1079.) The reason for using the 1950 invoices for these three companies is that in the ordinary course of business respondent had destroyed the invoices for 1941 through 1949 prior to 1955 when the study was prepared. (R. 1078.) Respondent's invoices to petitioner were available for the earlier years because petitioner had retained them.

Mr. Gayle testified that in 1952 he had made a "very detailed analysis of the cost of the billing, bookkeeping, and shipping in Harper's operation * * * based on their actual costs for the year 1951". (R. 1091-1092, 1092-1100.)

He then applied those actual costs to petitioner's invoices from respondent for the period from November 1, 1941 through December 31, 1941, for each of the years 1942 through 1949 and from January 1, 1950 through March 7, 1950. (R. 1101-1102, 1107.) Since these cost data were predicated upon respondent's actual costs for 1951, Mr. Gayle then adjusted these costs for each of the years here involved, based on the difference in wage rates and other factors during each of the years. Thus, for 1942 the cost figure was reduced to 55% (R. 1106) and similar adjustment was made for each of the other years. (R. 1107.)

Mr. Gayle then applied the same cost data in analyzing respondent's 1950 invoices to American News, Baker & Taylor, and A. C. McClurg as he had applied to respondent's

invoices to petitioner, similarly adjusted to the prior years, and thereby determined respondent's costs in doing business with these three companies with respect to the same three items, billing, bookkeeping, and shipping. (R. 1103-1104.) Such cost when divided by the total retail list price of all books purchased resulted in the percentage of cost as related to total purchases. (R. 1104.) The application of such percentage to petitioner's total purchases established the difference in cost to respondent as between petitioner and the three wholesalers—petitioner's alleged chief competitors.

Answering Petition, Points 2 and 3.

Petitioner objects to the submission to the jury of the cost study because adjusted figures of costs were used, although there was no dispute that respondent's actual cost data were not available. Petitioner also objects because the study did not include costs other than billing, bookkeeping, and shipping.

(a) *The adjusted figures:*

At the outset of the charge the Trial Judge told the jury that the jury had to pass upon the credibility of respondent's expert witness, Gayle, even though an expert, and weigh his testimony. He pointed out that this was a tremendous responsibility. (R. 1242-1243.) Further, he pointed out that Mr. Gayle, although an expert witness, was an employee of a company that had worked for respondent and that, accordingly, he had an "interest in the case". The Judge warned the jury that this interest had some bearing "upon whether or not the witness should be believed or not believed, or in the last analysis whether you believe the testimony is credible, or the weight that you should attach to any particular part or to all of that testimony". (R. 1245.)

Further, the Judge warned the jury:

> "However, it is entirely up to you as to whether you wish to accept or reject the assumptions made

by Gayle and the conclusions which he drew from them." (R. 1255.)

He finally warned the jury, almost immediately thereafter, that to accept Mr. Gayle's testimony it would have to find that Mr. Gayle's "computations were accurate and in accordance with sound accounting principles, and • • • that his assumptions are justified by the facts". (R. 1255.)

We submit that, when considered in context, there cannot be any doubt that the Court fairly and completely apprised the jury that it was its duty to weigh the evidence given by Mr. Gayle and to accept or reject the assumptions and methods he used, and, finally, that it was its right to accept or reject Mr. Gayle's testimony completely.

Moreover, the fact is that the Federal Trade Commission on several occasions has accepted cost studies prepared on the basis of one year for the purpose of justifying activities stretching over several prior years.

In *In the Matter of Minneapolis Honeywell Regulator Co., supra,* a 1941 cost study was held by the Commission to have partially justified the respondent's discount schedule, not only for 1941 but for earlier years as well. (44 F. T. C. 351, 380, 381, 393, 394.)

Additionally, in both the *Minneapolis Honeywell* and the *Sylvania* cases, *supra,* the Federal Trade Commission accepted cost studies prepared some years after the period of the alleged violations and after the complaints had been filed.

The Trial Judge therefore correctly admitted the Gayle study into evidence and correctly left to the jury the weight to be accorded to it.

(b) *Non-inclusion of all elements of cost*:

Petitioner insists that a cost study encompassing less than all elements of cost must be disregarded.

The burden which such a rule would impose on a respondent preparing a cost study would be literally unbearable. It would be completely impracticable, if not impossible, to track down each last element of cost.

The experts selected by the Federal Trade Commission to study this entire area have expressly noted the propriety of the "simple" cost study in an appropriate case, the question of whether the case is "appropriate", of course, being one of fact:

> "It is well to note that in some circumstances a very simple cost analysis is the best one. If the price differential is based entirely on some characteristic of the transaction whose cost can be directly measured, attention may be directed at that item of cost *and at no other.*" "Cost Justification Report", *supra,* at p. 15. (Italics added.)

The Trial Judge expressly left it for the jury to decide whether it would accept the theory and technique of respondent's study. This was clearly correct, for the omission from a cost study of any elements of cost can only affect the weight to be accorded to such study.

3. The Trial Judge adequately and correctly charged the jury with respect to the basis used by respondent for comparing the costs of doing business with petitioner and petitioner's alleged chief competitors. (Answering Petition, Point 4.)

The Trial Judge's charge completely summarized petitioner's arguments in this regard, and left it to the jury to weigh and appraise the cost study. Thus the Trial Judge stated:

> "The plaintiff has introduced evidence that the defendant made separate deliveries of books to branches of American News Company at higher discounts than it allowed the plaintiff on shipments of similar quantities. The evidence would justify you in finding that there were no cost savings in the shipment of similar quantities of books by the defendant to the plaintiff and the American News Company branches where they were separately invoiced which would justify the higher discount allowed to American News Company * * *.
>
> Reid says that there were instances where he had approximately the same quantity of books and

> yet he says there was a price differential which was in force against him to his disadvantage with respect to those shipments * * *.
>
> *It is up to you to determine whether or not you can accept or reject any or all of those contentions.* But if we had had a situation in which all of the business to American News Company was all done on the basis of small shipments to branches and then there were price differentials, you can see that obviously in that case there could not be any cost savings, because the shipping, billing and bookkeeping costs would always have been the same." (R. 1261-1262.) (Italics added.)

It is petitioner's contention, however, that it is *never* permissible under the cost proviso of the Robinson-Patman Act to show that in the aggregate there were savings in cost in selling a line of goods to one customer, as compared to another customer, even though on individual transactions the cost justification in one case might exceed the discount allowed, while in another case it would not equal the discount allowed.

This *exact* contention was rejected by the Federal Trade Commission in its recent decision dealing with the cost justification proviso to the Robinson-Patman Act—*In the Matter of Sylvania Electric Products, Inc., supra.*

The cost study presented in this case was patterned precisely upon the cost study presented by Sylvania to the Federal Trade Commission.

Commissioner Carretta in writing the decision for the Federal Trade Commission, in *In the Matter of Sylvania, supra,* expressly commented on this issue as follows:

> *"If a 'weighted average' price is used, the price differential between Sylvania distributors and respondent Philco appears to be substantially cost justified. If the individual prices on the different types of tubes are used to determine the amounts of the price differentials, some of the price differences appear to be more than cost justified while others are not entirely cost justified",* p. 35,329. (Italics added.)

The Commission nevertheless accepted the Sylvania cost study, found that the alleged discrimination had been fully cost justified, and dismissed the proceeding.

Furthermore, the Committee of experts appointed by the Federal Trade Commission to study these problems has expressly approved the *Sylvania* approach:

> "The prices to be compared in Robinson-Patman Act cases may be those of individual commodities, or of a group or 'set', where different items are normally bought and sold as a 'set', or a weighted average of the pieces of a line of related products."
>
> * * *
>
> "Classification or grouping of customers, orders, commodities, and transactions has repeatedly been recognized by the Federal Trade Commission as a *valid business practice. What this means is that it is not necessary to cost-justify each sale transaction or sales to each individual customer.* This is important for cost-justification purposes, since if no transaction or customer could be treated as a member of a class or group the cost of making each individual sale would have to be ascertained. Such refinement would be outside the realm of practicability and would tend to make price uniformity a necessity, regardless of economies of manufacture, sale, or delivery in dealing with certain customers." "Cost Justification Report", *supra,* at pp. 8 and 11. (Italics added.)

It is clear that, as held herein by the Court of Appeals, the propriety of "aggregating" or "averaging" is a question of fact in each case.* The Trial Judge, therefore, properly left this entire question to the jury (R. 1261-1262).

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* The *Sylvania* case is not novel doctrine. The Federal Trade Commission has permitted cost studies based on "averaging" or "aggregating" concepts in the following cases: *In the Matter of U. S. Rubber Co.* (1939), F. T. C. Docket No. 3685, 28 F. T. C. 1489; *In the Matter of U. S. Rubber Co.* (1950), F. T. C. Docket No. 4972, 46 F. T. C. 998; *In the Matter of Minneapolis Honeywell Regulator Co.* (1948), F. T. C. Docket No. 4920, 44 F. T. C. 331.

4. Any question concerning the Trial Judge's charge that a partial cost justification could be deducted *pro tanto* from an award of damages is moot. (Answering Petition, Point 5.)

Petitioner's contention reduces itself merely to this: A cost justification which justifies only part of an alleged differential cannot act as a complete defense to a charge of discrimination. With this truism we fully agree, but such is not the case here. We have demonstrated above that respondent's cost study and the testimony in the record relating to savings other than those reflected by the cost study were submitted to the jury for its consideration as to whether thereby respondent fully cost justified any alleged price differential.

Thereafter, the Trial Judge told the jury that should it find all of the necessary elements of a violation, in computing damages it could deduct from whatever discrimination it found the amount of justification shown by the Gayle report (R. 1262, 1263).

The jury, however, found for the respondent. *This can only mean that it never reached the question of the measure of damages.*

Accordingly, any conceivable error in the charge concerning damages is moot and the Court of Appeals so held. *Buckeye Powder Co.* v. *Dupont Powder Co.* (1918), 248 U. S. 55.

In any event, the charge is sustained by authority. The one court which has passed on the question has ruled that a cost justification, even if falling short of justifying an entire discrimination, and thus not a complete defense, nevertheless will reduce damages *pro tanto*. *American Can Co.* v. *Russellville Canning Co.* (8th Cir., 1951) 191 F. 2d 38, 56. Although petitioner implicitly claims conflict in this regard between the Fifth Circuit's decision in *American Can Co.* v. *Bruce's Juices, Inc.* (5th Cir., 1951) 187 F. 2d 919 and the decision of the Eighth Circuit in the *Russellville* case, *supra*, such conflict, on analysis, does not

exist.* The Fifth Circuit in *Bruce's Juices, supra,* at no point discussed the question of a *pro tanto* reduction of damages. Moreover, this question was not considered by this Court in either *Federal Trade Commission* v. *Morton Salt Co.* (1948), 334 U. S. 37, or *Bruce's Juices, Inc.* v. *American Can Co.* (1947), 330 U. S. 743, and, accordingly, the decision in the *Russellville* case *could not* conflict with those decisions, contrary to the assertions of petitioner (Petition 24-25.)

5. The Trial Judge acted entirely within his prerogative in commenting, as he did, on Defendant's Exhibit P. (Answering Petition, Point 7.)

Petitioner, on his direct examination, had testified that a fire suffered by him at his business premises on March 17, 1947, had been an inconvenience "and that it was a temporary problem but did not have any permanent effect at all" (R. 113).

Defendant's Exhibit P, a letter prepared by petitioner and sent by him to some of his creditors sometime between 1948 and 1950 (R. 235-236), directly contradicted his testimony as above set forth (Def.'s Ex. P, R. 235, Res. App. C. A. 1a).

Against this background and against the background that petitioner had testified on every basic issue involved in this case, the Trial Judge commented on Exhibit "P". He prefaced his remarks by telling the jury that he was commenting on the exhibit because

> "* * * it affects the credibility of Reid to a very important extent and must be considered by you in connection with the weight that you attach to his testimony and to the claim which he makes in this case" (R. 1266).

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* Petitioner does not assert a conflict between circuits as a basis for certiorari, either under "Questions Presented" (Petition, 3-4) or under "Reasons for the Granting of the Writ" (Petition, 14-15). Rather, he leaves the alleged conflict to implication and confusing language in an argument late in his petition. (Petition, 24-25.)

Thereafter, the Judge reviewed the letter and its impact on petitioner's credibility (R. 1266-1268). However, the Judge was careful to point out repeatedly to the members of the jury that they were the exclusive judges of the facts and that they were not to infer from any of his references to facts that he had an opinion or wished to inflict that opinion upon them. (R. 1225, 1227-1228, 1241, 1279-1280.)

Petitioner urges that the Trial Judge erred in his charge with respect to his comments on Exhibit P in that it permitted "* * * The injection of a motive criterion into a statutory action for price discrimination * * *". This claim of petitioner is negatived by the first sentence delivered by the Judge on this aspect when he pointed out that the reason for his commenting on the exhibit was the effect it might have on petitioner's credibility. (R. 1266.)

Furthermore, as pointed out by the Court of Appeals:

> "* * * the trial judge properly informed the jury that the plaintiff's motive for bringing the action had absolutely no bearing on his rights under the Robinson-Patman Act, but was relevant only to the extent that it bore on his credibility as a witness."

Nor is there any merit to petitioner's contention that the Trial Judge went beyond permissible limits in commenting as he did with respect to defendant's Exhibit P.

It is fundamental that a federal judge may comment upon evidence and even express an opinion, provided he tells the jury that they need not adopt his opinion and that they are the exclusive judges of the facts. *Daniels* v. *Goldberg* (2nd Cir., 1949), 173 F. 2d 911, 917.

Quercia v. *United States,* (1933), 289 U. S. 466, cited by petitioner, does not hold to the contrary. However, in that case, this Court found that the trial judge had committed reversible error, not because he had commented on the evidence but because he had *added* to the evidence and had based his instruction upon his own addition.

We submit that the comments of the Trial Judge herein referred to did not transgress permissible limits.

Conclusion

The case does not conflict with any decision of this Court or of any Court of Appeals. Nor does it raise any important question of Federal law warranting review.

Respondent urges that the petition be denied.

Respectfully submitted,

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